

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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GREGORY S. PHILLIPS,	:	
	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 02-1403-JJF
	:	
RICK KEARNEY, Warden,	:	
and	:	
ATTORNEY GENERAL OF THE	:	
STATE OF DELAWARE,	:	
	:	
Respondents.	:	
	:	

Gregory S. Phillips, *pro se* Petitioner.

Thomas E. Brown, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware. Attorney for the Respondents.

MEMORANDUM OPINION

April 21, 2003

Wilmington, Delaware

Farnan, District Judge

After finding that Petitioner Gregory S. Phillips violated the terms of his probation, the Delaware Superior Court revoked his probation and sentenced him to five years and nine months of Level V incarceration, to be suspended after successful completion of the Key Program for decreasing levels of supervision.¹ Petitioner, SBI #282662 and a *pro se* litigant, is currently incarcerated at the Sussex Correctional Institution ("SCI") located in Georgetown, Delaware. Petitioner filed this petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 *in forma pauperis*. (D.I. 1, 2.) Petitioner also filed a motion for the production of transcripts. (D.I. 6.) For the reasons set forth below, the Court construes the Petitioner's Reply to be a motion for leave to amend the original habeas petition, and grants such motion. (D.I. 19.) In addition, the Court will dismiss the Petitioner's amended habeas petition for failing to present a cognizable claim for federal habeas relief (D.I. 19) and will deny the motion for the production of

¹Upon completion of the Key Program, the Petitioner's sentence was to be suspended for one year of residential substance abuse treatment, followed by one year of Aftercare and eighteen months of Level III probation. See *Phillips v. State*, 790 A.2d 477 (Del.Sup.Ct. 2002).

transcripts as moot (D.I. 6).

I. FACTUAL AND PROCEDURAL HISTORY

On June 19, 1997, Petitioner Gregory S. Phillips pled guilty in the Delaware Superior Court to three of eleven charges for which he had been indicted: harassment, first degree reckless endangering, and possession of a deadly weapon by a person prohibited. (Del.Super.Ct.Crim.Dkt. 22.) The Superior Court sentenced him to eight and one half years in prison, suspended after a mandatory one year in prison for probation. (*Phillips v. State*, 790 A.2d 477 (D.I. 41) (Del. 2002).) Petitioner did not directly appeal this conviction.

On March 2, 2001, after a violation of probation hearing ("VOP hearing"), the Delaware Superior Court re-sentenced the Petitioner to five years and nine months in prison, suspended upon completion of the Key Program for decreasing levels of probation. (Del.Super.Ct.Crim.Dkt. 55; *Phillips v. State*, 790 A.2d 477 (D.I. 41 at 4).) The Superior Court specified that the Petitioner was to be discharged as unimproved from his reckless endangerment probationary sentence.

The Petitioner timely filed in the Delaware Superior Court a motion to modify or reduce the March 2001 sentence. (Del.Super.Ct.Crim.Dkt. 51.) The Superior Court denied the

motion, and the Petitioner timely appealed. (*Id.* at 59,62.) After an evidentiary hearing in the Superior Court, the Petitioner proceeded *pro se* on appeal. (*Id.* at 71,73.) The Petitioner appealed the violation of probation sentencing on the following grounds: 1) his extradition to Delaware was improper; 2) he did not receive a copy of the warrant providing notice of the underlying violation; 3) his probation officer violated his civil rights; 4) his probation officer lied at the violation hearing and testimony was omitted from the transcript; 5) he did not receive proper credit for time served; 6) he was sentenced beyond state sentencing guidelines, and the sentencing judge had a closed mind; and 7) the Key Program is unconstitutional, the Superior Court violated his constitutional rights by sentencing him to the Key Program, and the Superior Court abused its discretion by sentencing him to the Key Program in the absence of any evidence of a substance abuse problem. (Del.Sup.Ct. D.I. 22 lines 8,9; D.I. 50 at 9,10.)

On October 25, 2001, Petitioner filed a motion for post-conviction relief in the Delaware Superior Court. (Del.Super.Ct. Crim. Dkt. 92.) The Superior Court denied this motion on November 11, 2001, because the Petitioner's appeal was still pending in the Delaware Supreme Court. (Del.Super.Ct.Crim.Dkt. 93.)

On February 11, 2002, the Delaware Supreme Court affirmed

the sentence imposed by the Delaware Superior Court. *Phillips v. State*, 790 A.2d 477 (Del. 2002). Subsequently, on February 14, 2002, Petitioner filed a motion for post-conviction relief in the Delaware Superior Court. (Del.Super.Ct.Crim.Dkt 94.) The February 2002 motion for post-conviction relief challenged the sentence imposed in the March 2, 2001 VOP hearing on the following grounds: 1) the probation proceedings constituted double jeopardy; 2) the proceedings breached the original Rule 11 plea agreement; 3) the proceedings were illegal because the Petitioner was not serving all of the probation sentences on which he was re-sentenced; 4) the Court abused its discretion in sentencing because the Petitioner was not really guilty of the original offense; and 5) in general, there had been a miscarriage of justice. *State v. Phillips*, 2002 WL 524281, at *1 (Del.Super.Ct. Mar. 4, 2002). The Superior Court denied the motion because the claims were procedurally barred.² (*Id.*)

On August 20, 2002 the Petitioner filed a petition for federal habeas corpus relief. (D.I. 2.) The Respondents filed an answer on January 2, 2003, asking the Court to dismiss the petition because two claims are time barred, and all five claims

²The Superior Court noted that all of these issues could have been raised at the VOP hearing or on the Petitioner's direct appeal to the Supreme Court. Because the Petitioner did not demonstrate either cause for relief or prejudice, the court denied the motion for post conviction relief. *Phillips*, 2002 WL 524281, at *2.

are procedurally defaulted. (D.I. 15.) On January 8, 2003, the Petitioner filed a Reply to the Respondent's Answer. (D.I. 19.) In this reply, the Petitioner states that he waives all other claims and wishes to proceed on the due process violation "because of the Key only." (D.I. 19.)

II. GOVERNING LEGAL PRINCIPLES

A. Subject Matter Jurisdiction

A federal court may consider a habeas corpus petition filed by a state petitioner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In order for a claim alleging constitutional violations to be cognizable under the federal habeas corpus statute, the petition must also challenge the fact or length of confinement and seek immediate or speedier release. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); see *Heck v. Humphrey*, 512 U.S. 477, 480-81 (1994). If the requested relief will result in shortening the time of actual confinement in prison, then the claim is properly brought as a federal habeas petition. *Preiser*, 411 U.S. at 487. Conversely, a prisoner's claim relating solely to a "State's alleged unconstitutional treatment of [petitioner] while in confinement" is properly brought pursuant to 42 U.S.C. § 1983 and not 28 U.S.C. § 2254. *Preiser*, 411 U.S. at 499; *Leamer v. Fauver*, 288 F.3d 532, 542 (3d

Cir. 2002) (citations omitted).

There are situations, however, where a petitioner's claim might arguably be brought as either a § 2254 petition or a § 1983 action. *Leamer*, 288 F.3d at 541. For example, the petitioner might challenge both the conditions of confinement and the fact or length of confinement, *Preiser*, 411 U.S. at 499, and the deprivation of rights "necessarily impacts the fact or length or detention." *Leamer*, 288 F.3d at 541 (citations omitted). Although *Preiser* and its progeny dictates that this type of "overlapping" claim is cognizable only in federal habeas corpus, *Id.* at 499 n.14; *Heck*, 512 U.S. at 481; *Leamer*, 288 F.3d at 540, a prisoner can simultaneously *separately* litigate a federal habeas claim and a § 1983 claim relating to the conditions of confinement. *Preiser*, 411 U.S. at 499 n.14 (emphasis added).

The initial question of whether a claim is appropriately pursued via the federal habeas statute or § 1983 depends upon whether the claim "truly lies 'at the intersection'" of both statutes. *Leamer*, 288 F.3d at 543 (quoting *DeWalt v. Carter*, 224 F.3d 607, 617 (7th Cir. 2000)). According to the Third Circuit Court of Appeals, "[t]he operative test under *Preiser* and its progeny [for deciding that a claim should be brought pursuant to § 2254 rather than § 1983] is . . . whether a favorable determination of [petitioner's] challenge would *necessarily imply* that he would serve a shorter sentence." *Leamer*, 288 F.3d at

543. Federal habeas corpus relief is appropriate only if the claim falls "within the 'core of habeas' and require[s] sooner release if resolved in the plaintiff's favor." *Id.* at 544.

B. Standards of Review under the AEDPA

Even if a federal court has subject matter jurisdiction over the federal habeas claim, the court cannot review the merits of the claim until the court determines that the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are satisfied. When the petitioner is in state custody pursuant to a state court judgment, and the federal habeas claim was adjudicated in state court on the merits, then a federal court cannot grant a writ of habeas corpus unless it finds that the state court decision either: (1) was contrary to clearly established federal law; or (2) involved an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d).

This restriction of § 2254(d) only applies to claims that have been "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). Consequently, if the state court did not reach the merits of the claim, then this standard does not apply on federal habeas review. *Jermyn v. Horn*, 266 F.3d 257, 299-300 (3d Cir. 2001); *Appel*, 250 F.3d at 210. Rather, where a state court does not

adjudicate a claim on the merits, a federal court “‘must examine, without special heed to the underlying state court decision,’ whether the claim has merit.” *Jermyn*, 226 F.3d at 300 (quoting *Appel*, 250 F.3d at 210).

A federal habeas petitioner in state custody pursuant to a State court judgment must also satisfy the procedural requirements contained in the AEDPA.³ The federal habeas statute states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b) (1).

Before seeking habeas relief from a federal court, a state petitioner must first exhaust remedies available in the state courts. The exhaustion requirement is grounded on principles of comity in order to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000), *cert. denied*, 532 U.S. 980 (2001).

³Additionally, a federal habeas petition must be brought within the one-year period of limitations required by 28 U.S.C. 2244(d) (1).

The state prisoner must give "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). To satisfy the exhaustion requirement, a petitioner must demonstrate that the claim was fairly presented to the state's highest court, either on direct appeal or in a post-conviction proceeding. See *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997) (citations omitted); *Coverdale v. Snyder*, 2000 WL 1897290, at *2 (D.Del. Dec. 22, 2000). However, if the petitioner did raise the issue on direct appeal, then the petitioner does not need to raise the same issue again in a state post-conviction proceeding. *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1996); *Evans v. Court of Common Pleas, Delaware County, Pennsylvania*, 959 F.2d 1227, 1230 (3d Cir. 1992) (citations omitted).

To "fairly present" a federal claim for purposes of exhaustion, a petitioner must present to the state's highest court a legal theory and facts that are "substantially equivalent" to those contained in the federal habeas petition. *Coverdale*, 2000 WL 1897290, at *2; *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). It is not necessary for the petitioner to identify a specific constitutional provision in his state court brief, provided that "the substance of the . . . state

claim is virtually indistinguishable from the [constitutional] allegation raised in federal court." *Santana v. Fenton*, 685 F.2d 71, 74 (3d Cir. 1982) (quoting *Biscaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir. 1980)). Rather, a petitioner may assert a federal claim without explicitly referencing a specific constitutional provision by: (1) relying on pertinent federal cases employing constitutional analysis; (2) relying on state cases employing constitutional analysis in like fact situations; (3) asserting a claim in terms so particular as to call in mind a specific right protected by the Constitution; or (4) alleging a pattern of facts that is well within the mainstream of constitutional litigation. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *Evans*, 959 F.2d at 1231. Further, the state court does not have to actually consider or discuss the issues in the federal claim, provided that the petitioner did, in fact, present such issues to the court. See *Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984).

Generally, a federal court will dismiss without prejudice unexhausted federal habeas claims in order to permit petitioners to exhaust their claims in state court. *Lines v. Larkins*, 208 F.3d 153, 159-160 (3d Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001). When a habeas petition contains both exhausted and unexhausted claims (i.e., a mixed petition), the federal court must dismiss the entire petition for failure to exhaust state-

created remedies. *Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Lambert*, 134 F.3d at 513. However, a petitioner may choose to delete the unexhausted claims and proceed with the exhausted claims. *Rose*, 455 U.S. at 510; see *Reynolds v. Ellingsworth*, 843 F.2d 712, 724 n.22 (3d Cir.). Pursuant to Federal Rule of Civil Procedure 15(a), the court has discretion in granting leave to amend a pleading after the filing of a responsive pleading, and such leave is to "be freely given when justice so requires." Fed.R.Civ.P. 15(a); *Werner v. Werner*, 267 F.3d 288, 296 (3d Cir. 2001).

A petitioner's failure to exhaust state remedies will be excused if there is no available state remedy. *Lines*, 208 F.3d at 160; see *Teague v. Lane*, 489 U.S. 288, 297-98 (1989). However, even though these claims are treated as exhausted, they are procedurally defaulted. *Lines*, 208 F.3d at 160. A federal court may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice or a "fundamental miscarriage of justice." *McCandless*, 172 F.3d at 260; *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1999); *Caswell v. Ryan*, 953 F.2d 853, 861-62 (3d Cir. 1992).

To demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural

rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner can demonstrate "actual prejudice" by showing "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494. However, if the petitioner does not allege cause for the procedural default, then the federal court does not have to determine whether the petitioner has demonstrated actual prejudice. See *Smith v. Murray*, 477 U.S. 527, 533 (1986).

Alternatively, a federal court may excuse procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Wenger v. Frank*, 266 F.3d 218, 224 (3d Cir. 2001). In order to demonstrate a "miscarriage of justice," the petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. A petitioner establishes "actual innocence" by proving that no reasonable juror would have voted to find him guilty beyond a reasonable doubt. *Sweger v. Chesney*, 294 F.3d 506, 523-24 (3d Cir. June 27, 2002).

III. DISCUSSION

In his original federal habeas petition, the Petitioner

asserted the following claims:

(1) His guilty plea was involuntary because defense counsel failed to investigate his case by not consulting "any gun experts as to the range of a short barrel 12 gauge mosseburg with bird shot."

(2) He was sentenced for a violation of probation regarding the reckless endangering charge of which he was actually innocent.

(3) His sentence was illegal and violated due process because, in order for his sentence to be suspended, he was required to participate in the Key Program, which is "an abusive and unconstitutionally run program that utilizes inmates in almost complete authority over other inmates."

(4) The sentence imposed at the VOP hearing violated the plea agreement because he was serving probation concurrently for three sentences but the sentences were reimposed consecutively upon the violation of probation.

(5) The imposition of punishment for failing to participate in the Key Program constituted double jeopardy, and it lengthened the time of incarceration because he is being punished with "more years in prison and ten days isolation and eighty days loss of all privileges."

(D.I. 2.)

The Respondents assert that claims one and two are time barred by the one-year limitations period of 28 U.S.C. § 2244(d)(1) because they relate to the Petitioner's June 1997 guilty plea and sentence. Alternatively, they assert that all five claims are procedurally barred from federal habeas review because the Petitioner failed to present them to the Delaware Supreme Court. (D.I. 15 at 6-7.) Moreover, the Respondents succinctly allege that claim three does not state a cognizable claim for federal habeas relief because it does not challenge the

fact or duration of confinement. (*Id.* at 6 n.6.) They state that the Petitioner alleges only the prospect of supervision by other inmates in a drug rehabilitation program, and not that he is actually confined in violation of the laws or Constitution of the United States. (*Id.*)

In response to these assertions, the Petitioner filed a Reply stating that he waives all other claims and wishes to proceed on the due process violation "because of the Key only." (D.I. 19.) Further, the Petitioner counters that he did address the "inmate in authority over other inmates" issue in his direct appeal to the Delaware Supreme Court, and that the Key Program is a "state created liberty which gives [him] due process rights because of the suspension of jail time upon successful completion." (*Id.*)

The Court construes the Petitioner's request in his Reply as a motion for leave to amend his original habeas petition. Hence, pursuant to Federal Rule of Civil Procedure 15(a), the Court, in its discretion, will grant the Petitioner's motion to amend his habeas petition by deleting all claims except claim three, the due process claim.⁴ Consequently, the Respondent's assertion of

⁴Because the Petitioner is proceeding *pro se*, the Court reads his submissions liberally in an effort to provide review of his claims to the fullest extent permissible under federal habeas law. Thus, the Court interprets the Petitioner's cryptic statement that he "wishes to proceed on the due process violation because of the Key only" to mean that he wishes to proceed with claim three. Moreover, even if he intended to include claim 5

procedural default (and time-bar) is moot with respect to the deleted claims.

Normally, at this juncture, the Court would address the issues of exhaustion of state remedies and procedural default. However, because the Respondents assert that the Court does not have subject matter jurisdiction, and an affirmative determination would render the procedural analysis unnecessary, the Court now turns to this issue.

In essence, the Petitioner asserts that the inclusion of the allegedly unconstitutional Key Program in the VOP sentence violated due process because failure to complete the program adversely affects the time in confinement. In other words, making the suspension of his sentence contingent upon completion of an allegedly unconstitutional treatment program violates due process because he believes that it increases his time in confinement. (D.I. 2 at 6.)

The Respondents assert that this federal habeas claim is not cognizable under the federal habeas statute because the Petitioner alleges only the prospect of supervision, and not that he is actually confined in violation of the laws or constitution of the United States. (D.I. 15 at 6 n.6.) Although the Court agrees with the conclusion, it disagrees with the Respondent's

regarding double jeopardy in this statement, this claim is unexhausted and procedurally defaulted.

reasoning. The Petitioner does, in fact, allege that his present confinement violates due process. (D.I. 19.) Thus, on its face, this claim appears to sit within the "intersection" of the federal habeas statute and 42 U.S.C. § 1983 because it challenges the validity, length, and conditions of the sentence. See *Preiser*, 411 U.S. at 499.

Usually, the issue presented in an "overlapping" claim is whether a federal habeas corpus petition is the sole remedy. *Id.* However, in the present case, the Petitioner already has a § 1983 pending before this Court challenging the constitutionality of the Key Program itself.⁵ Thus, the question here is not whether the Petitioner has properly chosen between the statutes, but rather, whether the due process claim apparently challenging both the fact and length of confinement does, in fact, affect the length of the sentence.⁶

Although the issue here is not whether habeas is the sole remedy available, the test presented in *Leamer* still provides guidance for determining whether the Petitioner has presented a cognizable claim for federal habeas relief. The *Leamer* test is simple: if the federal habeas claim challenges the validity of

⁵*Phillips v. Graves*, CA No. 01-516.

⁶Because the Petitioner has a separate § 1983 case pending in this Court, the issue of whether the Key Program is unconstitutional is better left to the determination of that claim.

the continued conviction or the fact or length of the sentence, and a favorable determination of the challenge would require sooner release, then a prison confinement case is properly brought under the federal habeas statute. *Leamer*, 288 F.3d at 543-44. Conversely, if a favorable decision on the challenge will not change the prisoner's release date, then the challenge is properly brought as a § 1983 case. *Id.*

What relief, then, does the Petitioner request? The present claim challenges the validity and length of his sentence based upon his placement in the Key Program. The crux of his argument appears to rest on his *placement in and constitutionality of* the Key Program. Applying the *Leamer* test to the Petitioner's claim indicates that his placement in the Key Program does not lengthen his sentence. What the Petitioner fails to comprehend is that the Key Program is not a mandatory part of his sentence, *Clark v. Deshields*, 2001 WL 654960, at *1 (D.Del. Mar. 19, 2001), but rather, it is a pre-requisite for the *possibility* of reduced levels of incarceration.

The Petitioner's classification to the Key Program is "within the normal limits or range of custody [his] conviction authorizes the state to impose." See *Mason v. Kearney*, 2002 WL 31207195, at *3 (D.Del. Sept. 26, 2002).⁷ The Petitioner's

⁷The State is authorized to require completion of the Key Program pursuant to its criminal statute, Del. Code Ann., tit. 11 § 4202 (c)(8).

incarceration while participating in the Key Program is still considered institutional confinement and therefore counts toward the original five year, nine month sentence. *Compare Gresham v. Intensive Supervision Program*, 1999 WL 771075, at *5 (D.N.J. Sept. 27, 1999) (where the ISP program at issue, a post-sentence, post-incarceration program was still regarded as institutional confinement and the time spent in the program still went towards completion of the original sentence). If the Petitioner fails to complete the Key Program, the only consequence is that he will have to serve the full *original* sentence of five years nine months in prison; he will not benefit from progressively reduced levels of supervision. As stated by the State in its Answering Brief to the Delaware Supreme Court, "[t]he maximum term of his sentence is not contingent on his completion of the drug program, only the level of supervision at which he serves that term." (*Phillips v. State*, 790 A.2d 477 (D.I. 41 at 13.)). Basically, the Petitioner's claim affects a *condition* of imprisonment, not the *length or validity*.

Once again, the Court notes that the Petitioner has a § 1983 case pending before this Court. Because the alleged due process violation does not affect the length of confinement, the Court concludes that the Petitioner's habeas petition does not state a claim cognizable under the federal habeas statute. Accordingly, the Court will dismiss the petition, and will deny as moot his

motion for the production of transcripts.

III. CERTIFICATE OF APPEALABILITY

The Court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. The Court may issue a certificate of appealability only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this requirement, the petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, the Court has determined that the Petitioner's claim does not warrant federal habeas relief. The Court is persuaded that reasonable jurists would not find this conclusion debatable or wrong. Thus, the Petitioner has failed to make a substantial showing of the denial of a constitutional right, and the Court will not issue a certificate of appealability. An appropriate Order will be entered.

ORDER

For the reasons stated in the Court's Memorandum Opinion, IT IS HEREBY ORDERED THAT:

1. Petitioner Gregory S. Phillips' Reply (D.I. 19.) is treated as a motion to amend his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in

State Custody (D.I. 2.), and so treated, is GRANTED.

2. Petitioner's amended Petition for Writ of Habeas Corpus by a Person in State Custody (D.I. 19.) Is DISMISSED, and the relief requested therein is DENIED.
2. Petitioner's Motion for the Production of Transcripts (D.I. 6) is DENIED as moot.
3. The Court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

April 22, 2003
DATE

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE